No. 09-1460

In The

Supreme Court of the United States

ENTERTAINMENT PRODUCTIONS, INC., *et al.*,

Petitioners,

v.

SHELBY COUNTY, TENNESSEE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the lower courts erred by narrowly constructing Tennessee's Adult-oriented Establishment Registration Act of 1998, Tenn. Code Ann. § 7-51-1101, *et seq.* ("the Act"), in a manner to which it is readily susceptible and upholding it by finding no real or substantial overbreadth in regard to its legitimate scope.

(2) Whether the lower courts erred in applying the intermediate scrutiny test, including the requirements of *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) and *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), to uphold the constitutionality of the Act, which addresses deleterious secondary effects of "adult-oriented establishments," by finding that the Act provides a reasonable opportunity to open and operate "adult-oriented establishments."

LIST OF THE PARTIES

Petitioners, who were party plaintiffs-appellants to the proceedings in the lower courts, are: Entertainment Productions, Inc., a Tennessee corporation, d/b/a Christie's Cabaret; Platinum Rose, Inc., a Tennessee corporation, d/b/a Platinum Rose; 777 Memphis, Inc., a Tennessee corporation, d/b/a The Gold Club; Manhattan, Inc., a Tennessee corporation, d/b/a New York, New York; Tennessee Entertainment Concepts, Inc., a Tennessee corporation, d/b/a The Pony; 2882 Lambs Place, L.L.C., a Tennessee Limited Liability Company, d/b/a The Jet Strip; and 600 Marshall Entertainment Concepts, L.L.C., a Tennessee Limited Liability Company, d/b/a Downtown Dolls. Respondents, who were party defendants-appellees to the proceedings in the lower courts, are: Shelby County, a political subdivision of the State of Tennessee; the City of Memphis, Tennessee; and Robert E. Cooper, Jr., Intervenor, in his official capacity as Attorney General and Reporter for the State of Tennessee.

CORPORATE DISCLOSURE STATEMENT

Because the Respondents are governmental entities or an official, no corporate disclosure statement is needed.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List of the Parties	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	v
Opposition to Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes, and Ordinances Involved	2
Statement of the Case	2
Overview of the Act	5
A. The Act Is A Time, Place, And Manner Regulation Addressing Deleterious Secondary Effects Of Adult-oriented Establishments, Which Is Subject To Intermediate Scrutiny For Validity Under The First Amendment	5
B. The Act's Provisions Are Severable	8
C. The Act Has Been Upheld By Tennessee And Lower Federal Courts As Constitutionally Valid	9

TABLE OF CONTENTS – Continued

Page

D. The Act Is Patterned After A Long-standing Local Ordinance, Which Was Deemed Constitutional By The Lower Courts And Has Not Been Interpreted And Enforced In The Broad Manner Asserted By Petitioners 11

E. The Act Is Not "Model" Legislation 11

Reasons for Denying the Petition 12

A. The Lower Courts' Findings That There Is No "Real" And "Substantial" Overbreadth In Relation To The Act's "Plainly Legitimate Sweep," Based In Part Upon Application Of A Narrowing Construction, Comports With Precedent Of This Court 12

B. The Lower Courts Correctly Concluded That The Act Is Constitutionally Valid Under Intermediate Scrutiny And Would Not Result In An Invalid Substantial Reduction Of The Quantity And Availability Of Speech, Which Is Consistent With *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) 30

Conclusion 36

Appendix

Tenn. Code Ann. § 7-51-1109(a)(5) ..... App. 1

Tenn. Code Ann. § 7-51-1113 ..... App. 1

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

44 Liquor Mart v. Rhode Island,
517 U.S. 484 (1996) 34

Barnes v. Glen Theater, Inc.,
501 U.S. 560 (1991) 7, 30, 33, 34

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 14, 15

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 24

California v. LaRue,
409 U.S. 109 (1972) 34

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 4, 7, 8, 25, 33

City of Littleton v. J.Z. Gifts D-4, L.L.C.,
541 U.S. 774 (2004) 5

City of Los Angeles v. Alameda Books,
535 U.S. 425 (2002) 8, 30, 31

City of Newport v. Iacobucci,
479 U.S. 92 (1986) 34

City of Renton v. Playtime Theatres,
475 U.S. 41 (1986) 6, 8, 31

Member of City Counsel of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 28

New York v. Ferber,
458 U.S. 747 (1982) 14, 27

TABLE OF AUTHORITIES – Continued

Page

New York Liquor Authority v. Bellanca,
452 U.S. 714 (1981) 34

United States v. O'Brien,
391 U.S. 367 (1968) 6, 7, 9, 34

United States v. Salerno,
481 U.S. 739 (1987) 13

United States v. Stevens,
___ U.S. ___, 130 S.Ct. 1577,
78 USLW 4267 (2010) 15, 16

Village of Hoffman Estates v.
The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 24

Virginia v. American Booksellers Assn.,
484 U.S. 383 (1988) 15

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 24

UNITED STATES CIRCUIT COURTS OF APPEALS CASES

729, Inc. v. Kenton County, Ky.,
515 F.3d 485 (6th Cir. 2008) 33

Ben's Bar v. Village of Sommerset,
316 F.3d 702 (7th Cir. 2003) 33, 34, 35

Conchatta, Inc. v. Miller,
458 F.3d 258 (3rd Cir. 2006) 27

Déjà vu of Nashville v. Metropolitan
Gov't of Nashville and Davidson Co.,
274 F.3d 377 (6th Cir. 2001) 32

TABLE OF AUTHORITIES – Continued

Page

Entertainment Productions, Inc., et al. v. Shelby County, Tenn., et al., 588 F.3d 372 (6th Cir. 2009) .....*passim*

G.M. Enterprises, Inc. v. Town of St. Joseph, Wisc., 350 F.3d 631 (7th Cir. 2003) 34

Gammoh v. City of La Habra, 395 F.3d 1114 (9th Cir. 2005).....28

Giovani Carandola v. Bason, 303 F.3d 507 (4th Cir. 2002) 22

Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074 (4th Cir. 2006) 28, 30

J.L. Spoons, Inc. v. Gragani, 538 F.3d 378 (6th Cir. 2008) 24, 25, 26

Odle v. Decatur County, Tenn., 371 F.3d 386 (6th Cir. 2005) 10, 26, 27

Richland Bookmart v. Knox County, Tenn., 555 F.3d 512 (6th Cir. 2009) 32, 33, 34

Richland Bookmart v. Nichols, 137 F.3d 435 (6th Cir. 1998) 16

Sammy's of Mobile, Ltd. v. The City of Mobile, 140 F.3d 993 (11th Cir. 1998).....34

Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008) 24

Triplett Grille v. City of Akron, 430 F.3d 129 (6th Cir. 1994) 26

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES DISTRICT COURT CASES

Angela Kaye Belew, et al., v. Giles County Adult-Oriented Establishment Bd., No. 1-01-0139 (M.D. Tenn., Sept. 30, 2005) 10

Broadway Books, Inc. v. Roberts, 642 F. Supp. 486 (E.D. Tenn. 1986) 11

D.L.S., Inc. v. City of Chattanooga, 894 F. Supp. 1140 (E.D. Tenn. 1995) 11

Herbert L. Odle, d/b/a Sports Club, Inc. v. Decatur County, Tenn., No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Order granting Summary Judgment) 10

Paul Friedman v. Giles County Adult-Oriented Establishment Bd., No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005) 10

TENNESSEE STATE COURT CASES

American Show Bar Series, Inc., d/b/a Show Palace v. Sullivan County, Tn., 30 S.W.3d 324 (Tenn. Ct. App. 2000) 9

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993) 23

STATUTES

Tenn. Code Ann. § 1-3-110 .....9, 23

Tenn. Code Ann. § 7-51-1101 1

Tenn. Code Ann. § 7-51-1102(2) 17, 19, 23

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 7-51-1102(3), ...23

Tenn. Code Ann. § 7-51-1102(6) 19, 20, 21, 23

Tenn. Code Ann. § 7-51-1113 22

Tenn. Code Ann. § 7-51-1113(f) 22

Tenn. Code Ann. § 7-51-1113(g).....22

Tenn. Code Ann. § 7-51-1114 29

Tenn. Code Ann. § 7-51-1114 (a).....28

Tenn. Code Ann. § 7-51-1114 (b).....28, 29

Tenn. Code Ann. § 7-51-1114 (c).....28

Tenn. Code Ann. § 7-51-1114(d)(1)(B) 29

Tenn. Code Ann. § 7-51-1114(d)(1)(C) 6

Tenn. Code Ann. § 7-51-1114(d)(1)(D).....29

Tenn. Code Ann. § 7-51-1114(d)(2) 29

1998 Tenn. Pub. Acts Chapter 1090.....8

OTHER AUTHORITIES

Sup. Ct. R. 10.....17

Sup. Ct. R. 15.....1

Fed. R. Evid. 26 3

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Shelby County, Tennessee, and the City of Memphis, Tennessee, and Intervenor/Respondent Tennessee Attorney General and Reporter Robert E. Cooper, Jr., pursuant to Sup. Ct. R. 15, hereby oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's Order denying Petitioners' Petition for Rehearing and Rehearing En Banc is set forth at the Petition Appendix ("Pet. App.") 78-79.

The Sixth Circuit's decision is reported at *Entertainment Productions, Inc., v. Shelby County, Tenn.*, 588 F.3d 372 (6th Cir. 2009). (Pet. App. 1-42).

The district court's decision is reported at *Entertainment Productions v. Shelby County, Tenn.*, 545 F.Supp.2d 734 (W.D. Tenn. 2008). (Pet. App. 46-77).

JURISDICTION

The decision of the Sixth Circuit was entered on November 25, 2009, and the Petitioners' Petition for Rehearing and Rehearing En Banc was denied on March 10, 2010. The Petitioners' Petition for a Writ of

Certiorari was timely filed within ninety days of the order denying rehearing. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The First and Fourteenth Amendments to the United States Constitution are set forth at Pet. App. 80-82. Tenn. Code Ann. §§ 7-51-1102(2),(3),(6),(24), and (27), 7-51-1109(a)(5), and 7-51-1114, are set forth at Pet. App. 83-88. Tenn. Code Ann. §§ 7-51-1109(a)(5) and 7-51-1113 are set forth in Response Appendix ("Resp. App.") hereto at 1-3. Shelby County, Tennessee County Ordinance 344 is set forth at Pet. App. 89-94.

STATEMENT OF THE CASE

Petitioners operate "adult cabarets," which are "adult-oriented establishments," wherein traditional nude and semi-nude adult entertainment is presented. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Complaint, R.1, ¶s 4-9). Tennessee's Adult-oriented Establishment Registration Act of 1998, Tenn. Code Ann. §§ 7-51-1101, *et seq.* ("the Act") utilizes licensing and other reasonable regulations of adult-oriented establishments in order to address deleterious secondary effects, such as crime (particularly prostitution and

illegal drug sales or usage), public health concerns (especially regarding sexually transmitted diseases), decreased property values, and other adverse social impacts. When the Act was adopted for local application within Shelby County in 2007, Petitioners facially challenged the constitutional validity of the Act, seeking a blanket injunction prohibiting any enforcement of the Act.

Following a hearing conducted on April 11, 2008, the district court denied Petitioners' motion for preliminary injunction. In denying the motion and finding that Petitioners had failed to establish a substantial likelihood of success on the merits of any of their constitutional claims, the court did not reference or accredit the opinion-type testimony of Petitioners' Fed. R. Evid. 26 witness, Judith Lynn Hanna, Ph.D., a cultural anthropologist. The district court applied a narrowing construction from the text of the Act and found no real and substantial overbreadth. (Pet. App. 59-67).

Moreover, the district court found that "Shelby County, preliminarily, has presented evidence of activities by and at [Petitioners'] establishments which threaten public health and safety, and which potentially violate existing laws and ordinances." (Pet. App. 76). Shelby County presented evidence showing prostitution, drugs sales and usage, and other related criminal activity associated with

Petitioners' establishments.[1] While deprivation of First Amendment freedoms may constitute irreparable harm, "society's interest in protecting [erotic expression] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000). The district court concluded that, in balancing competing harms, the Government's desire to reduce criminal activity and other adverse societal impact associated with adult-oriented establishments weighs in favor of denying the injunctive relief. (Pet. App. 74-77).

The Sixth Circuit Court of Appeals affirmed that the district court did not abuse its discretion in denying Petitioners' motion for preliminary injunction, finding in part no likelihood of success on their claims that the Act is unconstitutional.[2] The Sixth

[1] A police vice officer testified that at the establishment of the one petitioner, "Downtown Dolls," who claims to be a "bikini bar," that the entertainers regularly removed their tops or moved their bottom clothing aside to reveal their genitalia. *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008, Hearing Proceedings, pp. 106-11.

[2] On September 29, 2009, prior to the Sixth Circuit decision, the district court granted Respondents' motions for summary judgment on all counts of Petitioners' complaint, except the count alleging overbreadth if the Act is applied to "bikini bars." This single issue remains for further hearing or trial. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), "Order Granting In Part and Denying In Part Defendants' Motions For Summary Judgment," Doc. #123).

Circuit rejected Petitioners' expansive reading of the Act and, through application of a narrowing construction of the Act's text, found that no real and substantial overbreadth in regard to the legitimate scope of the Act had been shown. (Pet. App. 7-42). Petitioners' claim that the Act's requirements will result in an unconstitutional reduction in the "quantity and accessibility of speech" was also rejected. (Pet. App. 42; *see also* Pet. App. 54-58).

In denying the extraordinary remedy of a blanket preliminary injunction, the lower courts considered the traditional four factors: (1) whether the plaintiff demonstrated a substantial likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction will cause substantial harm to others if issued; and (4) whether the public interest is served by issuance of the injunction. *City of Littleton v. J.Z. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004) (Pet. App. 5 & 48-49).

OVERVIEW OF THE ACT

A. The Act Is A Time, Place, And Manner Regulation Addressing Deleterious Secondary Effects Of Adult-oriented Establishments, Which Is Subject To Intermediate Scrutiny For Validity Under The First Amendment.

The lower courts applied the correct legal principle that this Court treats laws, like the Act,

that intend to combat deleterious secondary effects as being content neutral and appropriately subject to the intermediate scrutiny standard. (*See* Pet. App. 5-8; Pet. App. 49-52). "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" – a principle first enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). To withstand constitutional scrutiny, (1) the [Act or] Ordinance must have been enacted within [the Government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Id.* Restrictions on sexually explicit expression are valid under the First Amendment if they are intended to ameliorate adverse secondary effects of such expression, they further a substantial government interest unrelated to the suppression of free speech, they are narrowly tailored, and they "do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) (upholding zoning ordinance restricting location of sexually-oriented establishments).

The intermediate scrutiny test has been applied to uphold regulations similar to the Act's anti-nudity provision in Tenn. Code Ann. § 7-51-1114(d)(1)(C), which essentially requires entertainers in adult-oriented establishments to wear at least pasties and

g-strings. The *O'Brien* intermediate scrutiny test was applied by this Court to reject a challenge to the constitutionality of Indiana's public indecency statute, which likewise had the effect of requiring dancers at adult-oriented establishments to wear pasties and a g-string. *See Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). In his concurring opinion in *Barnes*, Justice Souter pointed to "the state's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified [in that case]." *Id.* at 582 (Souter, J., concurring). The "secondary effects" analysis and the *O'Brien* test were applied by the plurality in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-302 (2000) (O'Connor, J.), to reverse a ruling by the Pennsylvania Supreme Court that a City of Erie Public Indecency Ordinance (which has the effect of requiring exotic dancers to wear pasties and g-strings) is constitutionally invalid under the First Amendment.

> Being "in a state of nudity" is not an inherently expressive condition. . . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think *it falls within the outer ambit of the First Amendment's protection.*

Id. at 289 (emphasis added). "[T]he State's interest in preventing secondary effects [of public nudity and adult-oriented establishments] is not related to the suppression of expression." *Id.* This Court noted that "crime and other public health and safety problems

are caused by the presence of nude dancing establishments." *Id.* at 300.

This Court again applied the intermediate scrutiny test in overturning a Ninth Circuit decision invalidating on summary judgment a City of Los Angeles zoning provision prohibiting two adult uses per authorized location, which effectively would require the separation of adult book/video stores from on-premises viewing arcades. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). In *Alameda Books*, this Court did not abandon the intermediate scrutiny test, set forth in *Renton*, 475 U.S. at 46-50, for analyzing the constitutionality of time, place, and manner regulations designed to address deleterious secondary effects. This Court continues to adhere to the principle enunciated in *Renton* that a governmental regulation, like the Act, will be upheld as long as it is shown to be designed to serve a substantial government interest (reducing secondary effects) and that reasonable alternative avenues of communication remain available. 475 U.S. at 50.

B. The Act's Provisions Are Severable.

Even if overbreadth could be demonstrated by Petitioners, the Act's severability feature should operate to save the Act from a blanket injunction or invalidation. The Act, when enacted as 1998 Tenn. Pub. Acts Ch. 1090, as well as its amendments in 2001 and 2006, contained severability clauses.

Moreover, upon codification in the Tennessee Code, Tenn. Code Ann. § 1-3-110 provides for severability and elision of any specific clause, sentence, part, or section of the Code that may be found by a court to be constitutionally invalid. Therefore, should a court find that a particular clause, or provision of the Act may warrant declaratory or other relief, the relief should be limited to eliding that individual clause or section, whenever possible.

C. The Act Has Been Upheld By Tennessee And Lower Federal Courts As Constitutionally Valid.

The lower courts' rejection of this facial challenge comports with Tennessee's trial and appellate court holdings that the Act is constitutionally valid. (*See* Pet. App. 33; Pet. App. 51-52, 56-58). The Tennessee Court of Appeals rejected claims that the Act violates the free speech provisions of the United States and Tennessee Constitutions, or that certain provisions of the Act are allegedly constitutionally void for vagueness and overbreadth. *American Show Bar Series, Inc., d/b/a Show Palace v. Sullivan County, Tennessee*, 30 S.W.3d 324 (Tenn. Ct. App. 2000), *perm. app. denied* (Tenn. 2000). The state court affirmed the application of the intermediate scrutiny four-part test, as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to find the licensing and regulatory provisions of the Act to be constitutionally valid under the First Amendment and the Tennessee Constitution. *Id.* at 333-40. The court also rejected

claims that the Act's definitional sections are unconstitutionally vague and overbroad. The no-touching, six-foot buffer, and no-nudity requirements were deemed constitutional. *Id.* at 338-40 (citing appropriate federal law). The plaintiff strip clubs were found to have no vested property right under Tennessee law to sell alcoholic beverages, and the court concluded that the police power of the state allows the prohibition of alcoholic beverages in inappropriate venues. *Id.* at 330-33, 337. The Tennessee courts correctly applied the proper test for constitutionality, as set forth by this Court.

Moreover, the Act has also been upheld by the lower federal courts in Tennessee. *See, e.g., Herbert L. Odle, d/b/a Sports Club, Inc. v. Decatur County, Tenn.*, No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Order granting Summary Judgment); *aff'd in part*, 421 F.3d 386, 387-92 (6th Cir. 2005) (upholding the Act while enjoining a general applicability local ordinance as overbroad); *Angela Kaye Belew v. Giles County Adult-Oriented Establishment Board*, No. 1-01-0139 (M.D. Tenn., Sept. 30, 2005); *Paul Friedman v. Giles County Adult-Oriented Establishment Board*, No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005) (applying a narrowing construction in rejecting challenges that the Act is unconstitutionally vague or overbroad) (cited at Pet. App. 28; Pet. App. 66 & 69). Neither of these courts adopted the expansive interpretation of the Act asserted here by Petitioners.

D. The Act Is Patterned After A Long-standing Local Ordinance, Which Was Deemed Constitutional By The Lower Courts And Has Not Been Interpreted And Enforced In The Broad Manner Asserted By Petitioners.

The text of the Act, as well as the legislative history, demonstrates that the Act is patterned after or copies the provisions of the Chattanooga City Ordinance regulating adult-oriented establishments, which was initially enacted in the mid-1980s. These similar provisions of the Chattanooga City Ordinance were found to be constitutionally valid in the face of a variety ("shotgun approach") of challenges to virtually the entire ordinance. *See D.L.S., Inc. v. City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995), *aff'd*, 107 F.3d 403 (6th Cir. 1997); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986). Vagueness and overbreadth challenges to the similar definitions and provisions of the Chattanooga ordinance were rejected. *Broadway Books*, 642 F.Supp. at 490, n.2; *D.L.S., Inc.*, 894 F.Supp. at 1147. There is no showing that either the Chattanooga Ordinance or the Act has been interpreted in the expansive manner asserted by Petitioners so as to encompass mainstream entertainment and venues.

E. The Act Is Not "Model" Legislation.

There is no showing that the Act's definitional language at issue in this case has been addressed by any other circuit court. The Tennessee Act is not "model" legislation, and there is no showing that the

Act's express language has been utilized or followed in other states. Accordingly, Petitioners parsing over specific language, such as the distinction between the phrase "features as *a* principal use" and the phrase "features as *the* principal use" in the Act's definition of "adult cabaret" and the inclusion of an ungrammatical comma in one clause of the Act's definition of "adult-oriented establishment," does not present circuit conflicts or an important issue of law that this Court needs to settle.

REASONS FOR DENYING THE PETITION

The Sixth Circuit correctly concluded that the district court did not abuse its discretion in denying a blanket preliminary injunction prohibiting blanket enforcement of the Act. No substantial precedential or circuit conflict exists nor is a question of exceptional importance presented, therefore the Petition for a Writ of Certiorari should not be granted.

A. The Lower Courts' Findings That There Is No "Real" And "Substantial" Overbreadth In Relation To The Act's "Plainly Legitimate Sweep," Based In Part Upon Application Of A Narrowing Construction, Comports With Precedent Of This Court.

The Act, both facially and in its legislative history, establishes that it is enacted to address deleterious secondary effects commonly associated with adult-oriented establishments. The Act has

never been applied in the expansive manner asserted by Petitioners, an interpretation that they contend makes the Act unconstitutionally overbroad. Petitioners' nude and semi-nude adult-entertainment performances clearly fall within even the narrowed scope of the Act, and, as the Government's proof at the preliminary injunction hearing showed, Petitioners' establishments are actually associated with deleterious secondary effects, particularly crime (i.e., prostitution and drug possession/transactions). *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.) (Transcript of April 11, 2008, Hearing Proceeding, pp. 106-11, 115-23).

The Sixth Circuit (Pet. App. at 7-11, 23-4) and the district court (Pet. App. at 59-67) applied the appropriate law regarding the overbreadth doctrine. Normally, a facial challenge to a legislative act is the most difficult challenge to successfully mount because the plaintiff must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, under the overbreadth doctrine, when a regulation is not directed at the ultimate right of a person to present or procure protected expression, but instead regulates the manner of presentation, conduct plus speech is involved. When a regulation of conduct plus speech is at issue, the overbreadth must be "real" and "substantial" in relation to the statute's "plainly legitimate sweep" before the law should be invalidated on its face, and if an ambiguous term has created a constitutional

problem which may be solved by construction, courts have a duty to do so. *New York v. Ferber*, 458 U.S. 747, 770 (1982).[3] This Court has reiterated that the overbreadth doctrine is "strong medicine" and has employed it with hesitation and only as a last resort. *Id.* at 769; *see Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Consequently, because overbreadth in the First Amendment area may prohibit a state from enforcing a statute against conduct that is unquestionably within its power to proscribe, this Court has insisted that the overbreadth involved must be

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[3] In *Ferber*, this Court refused to find substantially overbroad a state statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material that depicted such a performance. *Id.*, 458 U.S. at 773-774. This Court, in reversing a finding of unconstitutional overbreadth, noted that the state appellate courts were understandably concerned that this statute directed at child pornography may implicate some protected expression "ranging from medical text books to pictorials in National Geographic." *Id.*

> Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the reach of this statute. Nor would we assume that the [state] courts would widen the possibly invalid reach of the statute by giving an expansive construction to [its proscription]. . . . Under these circumstances [the act] is 'not substantially overbroad and . . . whatever overbreadth may exist, should be cured through case-by-case analysis of the fact situation to which it sanctions allegedly, may not be applied.'

Id. (citations omitted).

"substantial" and "real" before the statute involved may be invalidated on its face. *Ferber*, 458 U.S. at 769-70.[4] Accordingly, if the statute is "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988).

The foregoing principles regarding the overbreadth doctrine were not abandoned in *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 78 USLW 4267 (2010), in which this Court upheld a finding that a federal statute prohibiting depictions of animal cruelty was facially invalid under the First Amendment, by deeming it to be substantially overbroad. In *Stevens*, it was not seriously disputed that

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[4] [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broedrick*, 413 U.S. at 615. For there are substantial social costs created by the overbreadth doctrine when it blocks application of the law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To insure that these costs do not swallow the social benefits of declaring a law overbroad, [the Court has] insisted that a law's application to protect its speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications ... before applying the strong medicine of overbreath invalidation." *Id.* at 613

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003)

the presumptively impermissible applications of the federal law far outnumbered any permissible ones. This Court rejected the Government's assurance that it would not enforce the law except for depictions of "extreme" cruelty, which was not an interpretation in keeping with the text of that law. *Id.* at 1591. This Court found that to read that law "as the Government desires requires rewriting, not just reinterpretation." *Id.* at 1592. The law in *Stevens* also subjected persons to compliance with a "bewildering maze of regulations from at least 56 separate jurisdictions," a situation not present with Tennessee's Act. *Id.* at 1589.

By contrast, rather than reading the definitions and restrictions in the Act in their broadest possible sense (as do Petitioners), the lower courts appropriately applied a plausible limiting construction to interpret the provisions realistically to effectuate the purposes of the Act.[5] (*See, e.g., Richland Bookmart v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (same approach used in upholding substantially similar definitions in Tennessee's Adult-oriented Establishment Act of 1995, Tenn. Code Ann. §§ 7-51-1401, *et seq.*). The lower courts set forth the correct legal principles of law regarding the overbreadth doctrine; Petitioners' real assertion is that the lower courts

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[5] The Sixth Circuit correctly noted that the "first step in overbreadth analysis is to construe the challenged statute, it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." (Pet. App. 12) (quoting *Williams*, 128 U.S. at 1838).

misapplied those principles of law, which is rarely a basis for granting certiorari review. Sup. Ct. R. 10.

An "adult cabaret,"[6] which is an "adult-oriented establishment" subject to licensing and regulation under the Act, does not encompass a real and substantial amount of mainstream venues not associated with secondary effects. (Pet. App. 12-17). The Sixth Circuit correctly concluded that there is no constitutional significance in terms of overbreadth to the use of "features as *a* principal use" rather than "features as *the* principal use" in the first clause setting forth the meaning of "adult cabaret." (Pet. App. 13-15) (emphasis added).

> [T]he chosen article is not the only or overriding signal of a statute's meaning. In this case, the common definition of the succeeding term ("principal") diminishes the significance of the indeterminate article. As

[6] Tenn. Code Ann. § 7-51-1102(2) specifies:

> "Adult cabaret" means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers[.]

> the district court noted, "principal" means "most important, consequential, or influential." (quoting *Webster's Third New International Dictionary* 1802 (3d ed.1993) (emphasis added)). In light of this definition, the substantive import of the alleged distinction between "the most important" and "a most important" use of a business is negligible.

(Pet. App. 13). Moreover, the Sixth Circuit logically concluded that "[a] 'run' of a [mainstream] performance, however long, that contains nudity, does not transform such a [mainstream] venue into an adult cabaret because no specific play, opera or ballet is commonly deemed to be 'a principal use' of a venue." (Pet. App. 14). Further, the Sixth Circuit concluded that:

> With regard to establishments that are devoted to multiple uses of equal importance, one of which is admittedly adult entertainment, their inclusion under the Act's regulatory scheme would not violate the First Amendment. Neither this court nor the Supreme Court has required that regulatory efforts to address secondary effects of sexually oriented businesses must be confined to establishments that accord unequivocal priority to adult entertainment over all other business uses.

(Pet. App. 14)

From a natural reading of the second clause of what the term "adult cabaret" "includes," the Sixth Circuit, like the district court, found:

> Read naturally, a "commercial establishment that features entertainment of an erotic nature" by any of the listed performers is an "adult cabaret" under the Act only if entertainment by these performers is a principal use of the business and if their attire exposes the anatomical areas specified in the first sentence. Read in this manner, the Act does not burden a substantial amount of protected expression unrelated to secondary effects.

(Pet. App. 15-16). The conclusion that the sorts of entertainment listed in the second sentence exemplifies rather than augments the first sentence of "adult cabaret" in Tenn. Code Ann. § 7-51-1102(2) involves a natural interpretation, not a rewriting, of the Act. Accordingly the Sixth Circuit's conclusion that no real and substantial overbreadth has been demonstrated in regard to the narrowly interpreted term "adult cabaret" is not erroneous and does not warrant this Court's review. (Pet. App. 12-17).

Applying the plausible narrowing construction asserted by the government respondents regarding the term "adult-oriented establishment,"[7] the lower

[7] "Adult-oriented establishment" is tri-partite definition.

> "Adult-oriented establishment" includes, but is not limited to, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment, adult cabaret, escort agency, sexual encounter center, massage parlor, rap parlor, sauna;

(Continued on following page)

courts rejected Petitioners' expansive interpretation of the Act as its only plausible reading. (Pet. App. 17-29).

> We find that the Tennessee Act is readily susceptible to a narrowing construction that would clearly except mainstream artistic venues from the licensing and regulatory scheme. Because we find it improbable that any performances of serious artistic value qualifying as "adult entertainment" would be staged in individualized booths, the number of ostensibly impermissible applications of the Act is negligible and does not rise to the level of real and substantial overbreadth.

(Pet. App. 29).

> further, "adult-oriented establishment" means any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.
>
> "Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import[.]

Tenn. Code Ann. § 7-51-1102(6) (line breaks added).

Petitioners' expansive reading of the Act also focused upon the possibly ungrammatical placement of a comma in the second section of the "further . . . mean[ing]" of "adult-oriented establishment." The Sixth Circuit agreed that this provision in Tenn. Code Ann. § 7-51-1102(6) should be interpreted, as asserted by Respondents, to mean:

> Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises
>
> [2A] for the purpose of viewing adult-oriented motion pictures,
>
> or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

(Pet. App. 24-25). Accordingly, the Sixth Circuit concluded:

> That is, providing "adult entertainment" [2B] will only make an establishment "adult-oriented" if entertainment is conducted in some kind of compartments separated from the common area [1]. This reading considerably reduces, if not completely eliminates, the alleged regulatory burden on

> mainstream artistic performances, since such are not commonly conducted on premises with the specified interior arrangement.

(Pet. App. 25). This interpretation of the Act's definition of "adult-oriented establishment" is consistent with the other requirements of the Act that in every adult-oriented establishment the interior portions of the "booths, cubicles, rooms or stalls, wherein adult entertainment is provided" be configured so that visibility is not blocked and they are readily accessible at all times. Tenn. Code Ann. § 7-51-1113(f) and (g).[8]

The Sixth Circuit found that application of the narrowing construction to the challenged definitions of the Act, "adult cabaret," "adult entertainment," and

[8] Tenn. Code Ann. § 7-51-1113, (Resp. App. 1-3), requires, in part

> (f) Every adult-oriented establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever.
>
> (g) The operator shall be responsible for and shall provide that any room or area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety

"adult-oriented establishments," in Tenn. Code Ann. § 7-51-1102(2), (3), and (6), (Pet. App. 24) is consistent with Tennessee statutory construction principles.[9]

> In construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution. . . . When faced with a choice between constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution and another which renders the statute unconstitutional, we must choose the former.

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 529-30 (Tenn. 1993). Accordingly, since two plausible constructions of the statute may exist, the Sixth Circuit acted consistent with this Court's precedent (and Tennessee law) by rejecting the most expansive reading and adopting the narrowing construction supported by the government defendants.

This is not the unique case that might call for a departure from this Court's normal practice of "defer[ring] to the construction of a state statute given it by the lower federal courts . . . to reflect [the Court's] belief that district courts and courts of

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[9] Furthermore, as previously noted, the Act's provisions are severable and subject to elision if any particular words, clauses, sentences or provisions are unconstitutional. *See* Tenn. Code Ann. § 1-3-110.

appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *see Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). The lower courts' findings (Pet. App. 7-42; Pet. App. 58-67), in which they reasonably rejected Petitioners' expansive interpretation of the scope of the Act, are thus entitled to deference.

The lower courts did not commit error by accepting the plausible narrowing construction of the text of the Act proffered by the government respondents. "Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n.5 (1982)).

The Sixth Circuit's decision in this case comports with its own prior decisions in which it rejected overbreadth claims in regard to regulations of nudity and public sexual conduct or contact. *See J.L. Spoons, Inc. v. Gragani*, 538 F.3d 379, 382-85 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 53 (2009); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 300 (6th Cir. 2008) (upholding a local ordinance, the Sixth Circuit rejected an overbreadth challenge, finding that "a

regulation banning total nudity in sexually-oriented businesses is far narrower than a similar regulation applicable to the general public"). In *J. L. Spoons*, the Sixth Circuit rejected a substantially similar challenge by Ohio strip club owners claiming that regulations of "nudity" and "sexual conduct or sexual contact" in establishments holding a liquor permit is unconstitutionally overbroad. As in the instant case, Judith Lynn Hanna, Ph.D., a cultural anthropologist and sociologist, testified for the plaintiffs as an expert witness at the preliminary injunction hearing claiming that a variety of "mainstream" ballet, modern dance, and theatrical productions allegedly involving types of nudity and sexual contact could be prohibited by Ohio's law. Rejecting her claims, the Sixth Circuit correctly concluded that Ohio's regulation is a "constitutional, content-neutral regulation of the undesirable secondary effects, including prostitution, drug trafficking, and assault, associated with nude dancing in an environment serving alcohol, [that] is not overbroad." 538 F.3d at 382. The Sixth Circuit found that the strip club owners failed to carry their burden of showing that the government regulation was substantially overbroad by encompassing mainstream works of art:

> While there may be legitimate artistic works that involve actors appearing in a state of nudity, "being in a state of nudity is not an inherently expressive condition" that is protected by the First Amendment. *Pap's*, 529 U.S. at 289. Moreover, the First Amendment does not provide a right to

> engage in sexual activity in public. The effect of [the Ohio Law] on legitimate artistic works is incidental and does not call for the "strong medicine" of overbreadth doctrine.

J.L. Spoons, 538 F.3d at 384-85.

The lower courts in this case distinguished decisions involving ordinances that prohibited nudity and sexual conduct at a wide array of public places and that did not contain any language readily susceptible to a limiting construction. (Pet. App. 22-27; Pet. App. 64-66). *See, e.g.*, *Odle*, 371 F.3d at 395-99 (ordinance that prohibited nudity and sexually suggestive acts in any public place where liquor was sold, served, or consumed found overbroad);[10] *Triplett Grille v. City of Akron*, 430 F.3d 129, 131, n.2, 135-36 (6th Cir. 1994) (general public indecency ordinance found overbroad because, based upon moral outrage, it prohibited nudity in all public places, without excepting "live performances with serious literary, artistic, or political value").

Likewise the Sixth Circuit's decision does not substantially conflict with those of other circuits that have found unconstitutional overbreadth in regard to "public place" regulations that restricted sexually

[10] *Odle* did not involve an application of a limiting construction but instead involved the rejection of the argument that no establishments existed in that rural county wherein mainstream entertainment with serious artistic or literary value was likely to be presented (a no harm, no-foul type argument) 421 F.3d at 393-99.

explicit conduct at any establishment licensed to sell alcoholic beverages or liquor. *Cf. Conchatta, Inc. v. Miller*, 458 F.3d 258 (3rd Cir. 2006), *cert denied*, 127 S.Ct. 1330 (2007) (finding overbroad a liquor statute and regulation that prohibited "lewd entertainment" in venues where alcohol was served); *Giovani Carandola v. Bason*, 303 F.3d 507 (4th Cir. 2002) (finding overbroad a liquor law prohibiting certain sexually explicit conduct in any venue licensed to sell liquor). The "public place" laws in both of these cases, like the ordinance in *Odle*, clearly applied to a substantial number of mainstream entertainment venues not associated with deleterious secondary effects and were not susceptible to a narrowing construction. These cases do not conflict with the Sixth Circuit's holding in this case involving the Act, which applies to adult-oriented establishments that are not likely to encompass mainstream entertainment venues and productions.

Tennessee's Act "is not invalid simply because some impermissible applications are conceivable." *Ferber*, 458 U.S. 747, 772 (1982). Any arguably impermissible application of the Act to citizens engaged in artistic expression amounts to no more than a fraction of the Act's legitimate reach. Indeed, like the Sixth Circuit in this case, other circuits have found that a statute is not unconstitutionally overbroad simply because it is possible to imagine hypothetical examples of protected nudity or conduct that might occur in the venues that are not exempt under the law. Under the overbreadth doctrine, these

hypothetical examples in which the law may be imagined to be overbroad must be "substantial" in comparison to the legitimate sweep of the law. *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1086 (4th Cir. 2006). For example, in upholding an ordinance requiring "adult cabaret dancers" to remain two feet away from patrons during performances, the Ninth Circuit observed that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119-22 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005). "Even if the [Plaintiffs] were able to identify performances that fulfill all aspects of an 'adult cabaret' that are not tied to the secondary effects the statute is designed to address." *Id.* at 1121-22 (9th Cir. 2005) (quoting *Member of City Counsel of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The Ninth Circuit found that the prohibitions in the ordinance applied only to dancers at "adult cabaret" establishments, which are commonly associated with deleterious secondary effects. The court thus found unpersuasive the allegations that a duet, a tango, or an Elvis impersonator, may fall within the ordinance's restrictions. *Id.* at 1121-22.

Having rejected Petitioners' definitional overbreadth claims, the Sixth Circuit also concluded that the prohibitions contained in Tenn. Code Ann. § 7-51-1114(b) and (c) (Pet. App. 87) do not unconstitutionally burden protected speech that is not

reasonably related to reducing deleterious secondary effects.[11] (Pet. App. 29-40). A natural reading of Tenn. Code Ann. § 7-51-1114 as a whole led the Sixth Circuit to conclude that subsection (b)[12] does not prohibit self-touching, as claimed by Petitioners. (Pet. App. 29-37).[13] The "self-touch" prohibition expressly stated in Tenn. Code Ann. § 7-51-1114(d)(1)(D) prohibits an entertainer from "fondling" one's "own genitals or those of another." (Pet. App. 87-88). This prohibition does not substantially burden protected speech in a manner not reasonably related to reducing public health concerns.

Restrictions regarding "simulated" sexual activities, and "fondling" of specified body areas (the

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[11] Petitioners do not seriously contest the validity of the Act's prohibitions of employees or entertainers performing "sexual intercourse or oral or anal copulation" or from engaging in "deviant sexual conduct." Tenn. Code Ann. § 7-51-1114(a) and (d)(1)(B). (Pet. App. 87).

[12] Tenn. Code Ann. 7-51-1114(b) states:

> (b) No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.

Even Petitioners' witness, Dr. Hanna, acknowledged on cross-examination that subsection -1114(b) does not prohibit self-touch. *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008 Hearing Proceedings, p. 79.

[13] Also contrary to Petitioners' implication, the Act does not prevent the exposure of the bare female breast, except for the nipple. Tenn. Code Ann. § 7-51-1114(d)(2). (Pet. App. 88).

breast, buttock, anus, vulva, or genitals), plus an anti-nudity prohibition that requires the erotic dancers to wear pasties and g-strings, which are contained in a North Carolina regulation of establishments permitted to sell alcoholic beverages, were upheld by the Fourth Circuit as not being unconstitutionally vague or facially overbroad *Giovani Carandola*, 470 F.3d at 1078-85; *see Barnes*, 501 U.S. at 571 (plurality opinion) ("[T]he requirement that the dancers don pasties and g-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic").

Following this Court's precedent, the lower courts have addressed overbreadth challenges involving sexually explicit speech and adult-oriented establishments on a case-by-case basis. No substantial conflict among the circuits exists; there is no demonstrated need for this Court's intervention.

B. The Lower Courts Correctly Concluded That The Act Is Constitutionally Valid Under Intermediate Scrutiny And Would Not Result In An Invalid Substantial Reduction Of The Quantity And Availability Of Speech, Which Is Consistent With *City Of Los Angeles V. Alameda Books*, 535 U.S. 425 (2002).

The Sixth Circuit's rejection of Petitioners' claim that enforcement of the Act will result in an unconstitutional reduction in the "quantity and accessibility of speech" does not conflict with the

precedent of this Court. (Pet. App. 42; Pet. App. 54-58). Although Justice Kennedy has expressed the view that the Government cannot intend to reduce secondary effects in half by correspondingly reducing the number of adult-oriented establishments by the same proportion. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 449-51 (2002) (Kennedy, J., concurring). This Court has never declared invalid an otherwise constitutional regulation of adult-oriented establishments merely because the proprietors assert that they will voluntarily cease presenting adult entertainment – a consequence that is neither the intent nor a requirement of the challenged law. There is no showing that the reductions in secondary effects sought through implementation of the Act was intended by the Tennessee legislature to be achieved by a proportional reduction in the number of adult-oriented establishments or the availability of protected speech.

The intermediate scrutiny test in *Renton*, 475 U.S. at 54, requires that the Government provide a reasonable opportunity to open and operate a sexually-oriented establishment, which the Act allows. Accordingly, the lower courts rejected Petitioners' claim that the Act will virtually eliminate all sexually-oriented speech within Memphis. As the district court found, "[n]othing in the Act suggests that [Petitioners'] rights to operate such a business would be foreclosed." (Pet. App. 56). The district court found "it is clear that the purpose of Act is to minimize the deleterious secondary effects of

sexually-oriented businesses rather than to reduce sexual speech." (Pet. App. 57-58). The district court further found that the Act does not foreclose the Petitioners' right to operate a business, specifically noting the constitutional validity of prohibitions against serving or consuming alcoholic beverages on the premises; requirements of a six-foot distance between performing entertainers and other entertainers, employees or customers; and prohibitions concerning the degree of nudity allowed in adult-oriented establishments. (Pet. App. 56-57).

Although the Act does not facially prohibit them from operating, Petitioners contend that rather than operate in compliance with the law, they would voluntarily choose to cease presenting adult entertainment. As noted by the district court, the Act's licensing and related regulations are the same or substantially similar to provisions contained in other sexually-oriented business establishment regulations upheld by this Court, as well as the Sixth and other circuit courts. (Pet. App. 56-57). For example, lower courts have held that adult-oriented establishments and entertainers may be required to obtain licenses;[14] may be required to maintain a (three to six-foot)

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[14] *See, e.g., Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 532-33; *Odle*, 421 F.3d at 389-92; *Déjà Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377, 390-96 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002).

buffer during performances;[15] and may be prohibited from presenting totally nude erotic dancing.[16]

Petitioners' principal economic complaint regards the Act's prohibition of the sale, service, or consumption of alcoholic beverages on the premises of adult-oriented establishments. (Pet. App. 56) (*see* Tenn. Code Ann. § 7-51-1109(a)(5), Resp. App. 1). But the federal courts have upheld similar laws prohibiting adult-oriented establishments from selling alcoholic beverages in order to prevent deleterious secondary effects arising from the "explosive combination of nude dancing and alcohol consumption." *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 (7th Cir. 2003). The Act does not violate any constitutionally protected right to both sell and serve or consume alcoholic beverages on premises offering adult-oriented entertainment.

This Court, as well as lower federal courts, have long and consistently upheld ordinances that prohibit

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[15] The Act's precise six-foot buffer requirement was upheld in *DLS, Inc.*, 107 F.3d at 410-13. Similarly-worded buffer provisions were upheld in *Richland Bookmart v. Knox County, Tenn.*, 555 F.3d 512, 532 (6th Cir. 2009); *Déjà Vu of Nashville*, 274 F.3d at 396; *see also 729, Inc. v. Kenton County, Ky.*, 515 F.3d 485, 492 (6th Cir. 2008) (upholding a five-foot buffer between customers and entertainers for one hour after performing semi-nude on stage).

[16] *Pap's*, 529 U.S. at 284; *Barnes*, 501 U.S. 560 (1991), *see also Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 528-31 (each upheld an ordinance interpreted as effectively prohibiting total "nudity" in sexually-oriented establishments).

the sale of alcoholic beverages for on-premises consumption in establishments that offer topless female dancing. *See, e.g., California v. LaRue*, 409 U.S. 109, 114 (1972) (the Government's "conclusion . . . that certain sexual performances and the dispensation of [alcoholic beverages] ought not to occur at premises that have licenses was not an irrational one.");[17] *Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 531-32 (upholding ordinance prohibiting the sale, use, or consumption of alcohol on-premises of sexually-oriented businesses); *G.M. Enterprises, Inc. v. Town of St. Joseph, Wisc.*, 350 F.3d 631, 636 (7th Cir. 2003) (quoting *Ben's Bar*, 316 F.3d at 722-727) (finding there is no constitutional entitlement to purchase and drink alcohol while watching nude or semi-nude dancing "at the same time and in the same place"); *Sammy's of Mobile, Ltd. v. The City of Mobile*, 140 F.3d 993, 995-99 (11th Cir. 1998), *cert. denied*, 120 S.Ct. 1553 (2000) (holding that ordinance

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[17] This principle was reaffirmed in *44 Liquor Mart v. Rhode Island*, 517 U.S. 484 (1996). "[E]ntirely apart from the 21st Amendment, the state has the [inherent police] power to prohibit the sale of alcoholic beverages in inappropriate places." *Id.*, 517 U.S. at 515. Under the *Barnes-O'Brien* intermediate scrutiny test, even after *44 Liquor Mart*, *LaRue*, "would come out the same way." *Id. See also, e.g., City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (upholding city ordinance prohibiting semi-nude dancing in establishments licensed to sell liquor for on premises consumption); *New York Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (upholding ban of the sale of liquor on premises where topless dancing occurs, noting "common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior").

prohibiting alcohol on the premises of adult-oriented establishments did not ban nude dancing, noting, "we are unaware of any constitutional right to drink while watching nude dancing").

"[T]he deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message." *Ben's Bar*, 316 F.3d at 728. Petitioners do not assert that a patron has to be consuming alcohol to receive whatever "message" is being communicated by the entertainers in adult-oriented establishments – a point confirmed by the testimony of their witness, Dr. Hanna. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008, Hearing Proceeding, pp. 82-3).

Having rejected Petitioners' overbreadth and vagueness claims, the Sixth Circuit properly found that it was "unpersuaded that the Act's provisions are 'so onerous' as to cause the majority of Memphis's nightclubs to 'cease presenting adult entertainment entirely.'" (Pet. App. 42). That decision does not conflict with applicable precedent of this Court, nor does it conflict with applicable decisions of the other circuits. This Court's review is therefore unwarranted on this issue as well.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Tenn. Code Ann. § 7-51-1109(a)(5)

(a) The board shall revoke, suspend or annul a license or permit for any of the following reasons:

* * *

(5) Any intoxicating liquor or malt beverage is served or consumed on the premises of the adult-oriented establishment, when an operator, employee, entertainer, or escort knew, or should have known, of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation[.]

Tenn. Code Ann. § 7-51-1113

(a) The operator shall maintain a register of all employees, entertainers, or escorts, showing for each person the name, permit number issued under this part, any aliases used, home address, age, birth date, sex, height, weight, color of hair and eyes, telephone number, social security number, driver license number, date of employment and termination, and duties associated with the adult-oriented establishment. This information on each employee shall be maintained in the register on the premises for a period of three (3) years following termination.

(b) The operator shall make the register of employees available immediately for inspection by the board or sheriff's department upon demand of a

member of the board or sheriff's department at all reasonable times.

(c) Every act or omission by an employee constituting a violation of the provisions of this part shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(d) An operator shall be responsible for supervising the conduct of all entertainers and employees while on the licensed premises, and shall exercise due diligence in taking reasonable efforts to prevent acts or omissions of any entertainers or employees constituting a violation of the provisions of this part, with the operator's failure to reasonably fulfill this duty constituting a ground for determining whether the operator's license shall be revoked, suspended or renewed.

(e) No employee of an adult-oriented establishment shall allow any minor to loiter around or to frequent an adult-oriented establishment or to allow any minor to view adult entertainment as defined in this part.

(f) Every adult-oriented establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or

stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever.

(g) The operator shall be responsible for and shall provide that any room or area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety.

(h) The license shall be conspicuously displayed in the common area of the premises at all times.

(i) The permit shall be kept by an employee, entertainer, or escort so that it is readily available for display immediately upon request by any member of the county sheriff's department or other appropriate law enforcement official, any board member, or any person designated by the board to assist it in enforcing this part. Each employee, entertainer, or escort shall immediately display or disclose the employee, entertainer, or escort's valid permit number to any customer upon request.